

October 30, 2021

Submitted via FOIAonline (<https://www.foiaonline.gov>)

National FOIA Office
U.S. Environmental Protection Agency
Region 4
1200 Pennsylvania Avenue, N.W. (2310A)
Washington, D.C. 20460

RE: Freedom of Information Act Request and Fee Waiver Request

Dear FOIA Officer:

This request is made pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”), and 40 C.F.R. pt. 2, on behalf of Friends of the Lower Keys (“FOLKS”). Consistent with its missions, FOLKS hereby requests copies of the following records¹ from the Environmental Protection Agency (“EPA”):

1. Any and all records relating to EPA’s September 15, 2021 Memorandum to all Water Division Directors EPA Regions 1-10, Subject: *Rescission of the January 2021 Guidance Document, “Applying the Supreme Court’s County of Maui v. Hawaii Wildlife Fund (Maui)” Decision in the Clean Water Act Section 402 National Pollutant Discharge Elimination System Permit Program [“NPDES”]* (“September 15, 2021 Memorandum”) as applied to the State of Florida. The Memorandum provides the following guidance to all EPA Regions:

The Office of Water is evaluating appropriate next steps to follow the rescission of the guidance. In the interim, the Supreme Court’s decision provides guiding principles regarding when a discharge to groundwater is jurisdictional under the Clean Water Act that permit writers can use to implement the decision. No language in the decision suggests that the existence, or lack, of a state groundwater protection program has any bearing on whether the “functional equivalent” analysis applies. Rather, the focus of the Court’s decision is on whether a permit is required to protect surface waters, not to protect groundwater itself. Therefore, the existence of state groundwater protection programs does not obviate the need for NPDES permitting authorities to apply the factors that the Supreme Court identified in its decision in deciding whether a discharge from a point source through groundwater that reaches jurisdictional surface water requires an NPDES permit. (Emphasis added)

This request seeks records that relate to EPA’s Region 4’s implementation of the

September 15, 2021 Memorandum within the Region, as well as records that relate to Region 4's assistance to and/or oversight of the State of Florida Department of Environmental Protection's ("FDEP") review of groundwater injection wells "in deciding whether a discharge from a point source through groundwater that reaches jurisdictional surface water requires an NPDES permit." September 15, 2021 Memorandum. Further, this request also seeks records relating to Region 4's review of any injection well permit within the Region and its decision regarding such permit(s) under the September 15, 2021 Memorandum.

This request includes any communications between EPA and FDEP, between EPA and Monroe County, Florida and/or any municipality in Florida, and internal EPA communications. These communications include, but are not limited to, the opinions, comments, suggestions, ideas, positions, and/or any statements stated by EPA, FDEP, Monroe County, Florida and/or any municipality in the Florida Keys.

2. Any and all records relating to the use of shallow injection wells by the **City of Marathon, Florida** to dispose of wastewater and/or stormwater, including, without limitation, whether such disposal is the "functional equivalent" of a point source discharge to jurisdictional surface waters requiring an NPDES permit. This includes, without limitation, a **pending Application for Operating Permit Major Modification for Permit # FLA 642851**.

This request includes any communications between EPA and FDEP, between EPA and Monroe County, Florida and/or any municipality in the Florida Keys and internal EPA communications. These communications include, but are not limited to, the opinions, comments, suggestions, ideas, positions, and/or any statements stated by EPA, FDEP, Monroe County, Florida and/or any municipality in the Florida Keys.

FOLKS request all records from the time of the *Maui* decision through the present, as well as those dated subsequent to the date of this request and before EPA's fulfillment of this FOIA request. Please tender responsive records in digital format whenever possible.

* * *

Please identify and inform us of all responsive or potentially responsive records within 20 working days as required by FOIA, 5 U.S.C. § 552(a) (6) (A) (a), and the basis of any claimed exemptions, including a description of each specific responsive or potentially responsive records(s) to which such exemption may apply. *See Citizens for Responsibility and Ethics in Wash. v. Federal Election Comm'n*, 711 F.3d 180, 182-83 (D.C. Cir. 2013) (holding that the agency must identify the exemptions it will claim with respect to any withheld documents within the time frame prescribed by FOIA). The Supreme Court has stated that FOIA establishes a "strong presumption in favor of disclosure" of requested information, and that the burden is on the government to substantiate why information may not be released under FOIA's limited exemptions. *Dep't of State v. Ray*, 502 U.S. 164, 173 (1991). Congress affirmed these tenets of FOIA

in legislation as recently as December 2007, stating that government remains accessible to the American people and “is always based not upon the ‘need to know’ but upon the fundamental ‘right to know.’” Pub. L. No. 110-175, 121 Stat. 2524, 2525 (Dec. 31, 2007).

If your office takes the position that any portion of the requested records is exempt from disclosure, we request that you provide us with an index of those records as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.” *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979). A *Vaughn* index must (1) identify each document or portion of document withheld; (2) state the statutory exemption claimed; and (3) explain how disclosure of the document or portion of document would damage the interests protected by the claimed exemption. *Citizens Comm’n on Human Rights v. FDA*, 45 F.3d 1325, 1326 n.1 (9th Cir. 1995). “The description and explanation the agency offers should reveal as much detail as possible as to the nature of the document,” in order to provide “the requestor with a realistic opportunity to challenge the agency’s decision.” *Oglesby v. U.S. Dep’t of Army*, 79 F.3d 1172, 1176 (D.C. Cir. 1996). Such explanation will be helpful in deciding whether to appeal a decision to withhold documents and may help to avoid unnecessary litigation.

In the event that some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable, non-exempt portions of the requested records. See 5 U.S.C. § 552(b). If it is your position that a document contains non-exempt segments and that those non-exempt segments are so dispersed throughout the documents as to make segregation impossible, please state what portion of the document is non-exempt and how the material is dispersed through the document. *Mead Data Cent. v. U.S. Dep’t of the Air Force*, 455 F.2d 242, 261 (D.C. Cir. 1977). Claims of non-segregability must be made with the same detail as required for claims of exemption in a *Vaughn* index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

FOIA requires federal agencies to make their records “promptly available” to any person who makes a proper request for them. 5 U.S.C. § 552(a)(3)(A) (as amended by OPEN Government Act of 2007, Pub. L. No. 110175, 121 Stat. 2524).

Presumption of Openness and “Foreseeable Harm” Standard

On his first full day in office, President Obama demonstrated his commitment to the ideals of transparency and openness by issuing a Memorandum to the heads of all Executive Branch Departments and agencies by calling on them to “renew their commitment to the principles embodied in FOIA.” See Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the FOIA, 74 Fed. Reg. 4683 (Jan. 21, 2009). The President directed all agencies to administer the FOIA with a clear presumption in favor of disclosure, to resolve doubts in favor of openness, and to not withhold information based on “speculative or abstract fears.” *Id.* In addition, the

President called on agencies to ensure that requests are responded to in “a spirit of cooperation,” that disclosures are made timely, and that modern technology is used to make information available to the public even before a request is made. *Id.*

In accordance with the President’s directives, on March 19, 2009, Attorney General Holder issued new FOIA guidelines, calling on all agencies to reaffirm the government’s “commitment to accountability and transparency.” Memorandum from Attorney General Eric Holder for Heads of Executive Departments and Agencies (Mar. 19, 2009), available at <http://www.justice.gov/ag/foia-memo-march2009.pdf>. The Guidelines stress that the FOIA is to be administered with the presumption of openness called for by the President. *Id.* at p. 1.

The Attorney General “strongly encourage[d] agencies to make discretionary disclosures of information.” *Id.* He specifically directed agencies not to withhold information simply because they may do so legally and to consider making partial disclosures when full disclosures are not possible. *Id.* He also comprehensively addressed the need for each agency to establish effective systems for improving transparency. *Id.* at p. 2. In doing so he emphasized that “[e]ach agency must be fully accountable for its administration of the FOIA.” *Id.*

In issuing these new guidelines, Attorney General Holder established a new “foreseeable harm” standard for defending agency decisions to withhold information. Under this new standard, the U.S. Department of Justice will defend an agency’s denial of a FOIA request “only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.” *Id.* As a result, “agencies must now include the ‘foreseeable harm’ standard as part of the FOIA analysis at the initial request stage and the administrative appeal stage.” Department of Justice Guide to the FOIA (2009), p. 25, available at http://www.justice.gov/oip/foia_guide09.htm.

This presumption of openness was enshrined in law when Congress passed, and President Obama signed, the FOIA Improvement Act of 2016, Pub. L. No. 114-185, which added a new section to FOIA that states:

- (8)(A) An agency shall –
 - (i) withhold information under this section only if –
 - (I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or
 - (II) disclosure is prohibited by law; and
 - (ii) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and
 - (iii) take reasonable steps necessary to segregate and release nonexempt information; and....

5 U.S.C. § 552(a)(8).

Request for Fee Waiver

FOIA was designed to grant a broad right of access to government information, with a focus on the public's "right to be informed about what their government is up to," thereby "open [ing] agency action to the light of public scrutiny." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). A key component of providing public access to those records is FOIA's fee waiver provision, 5 U.S.C. § 552(a)(4)(A)(iii), which provides that "[d]ocuments shall be furnished without any charge or at a [reduced] charge . . . if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester."

FOIA's fee waiver requirement is to be "liberally construed." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dep't of the Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005). The fee waiver amendments of 1986 were designed specifically to provide organizations such as FOLKS access to government documents without the payment of fees. As one Senator stated, "[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information . . ." 132 Cong. Rec. S. 14298 (statement of Senator Leahy). Indeed, FOIA's fee waiver provision was intended "to prevent government agencies from using high fees to discourage certain types of requesters and requests, in clear reference to requests from journalists, scholars, and . . . non-profit public interest groups." *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93-94 (D.C. Cir. 1986) (quoting *Ettlinger v. FBI*, 596 F. Supp. 867, 876 (D. Mass. 1984)).

FOLKS, a non-commercial requester, hereby requests a waiver of all fees associated with this request because disclosure "is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l). This request satisfies both statutory and regulatory requirements for granting a fee waiver, including fees for search, review, and duplication.² Below, stated first in bold, are the criteria considered by EPA under its regulations in assessing requests for fee waivers, followed by an explanation of FOLKS' satisfaction of those requirements. *See* 40 C.F.R. § 2.107(l).³ Fee waiver requests must be evaluated based on the face of the request. *See Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Justice*, 602 F. Supp. 2d 121, 125 (D.D.C. 2009).

(1) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government. The subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.

The requested records relate to EPA's implementation of its own September 15, 2021 Memorandum in Region 4 and in the State of Florida specifically. Further, the requested records relate to EPA's oversight of its delegation of the federal NPDES permit program to the State of Florida and oversight of the State of Florida's permit issuance and modification processes for consistency with NPDES regulations⁴ and oversight of the EPA/DEP Florida Keys Reasonable Assurance Program's implementation of and consistency with the Clean Water Act ("CWA"). Moreover, the requested records relate to Chapter 62-304 F.A.C. which specifically addresses the federally-recognized Total Maximum Daily Load ("TMDL") for nutrients and dissolved oxygen and the federal government's determination of impairment and the FDEP's pending requests to de-list the Florida Keys from the 303(b) impairment list and to change its surface water quality regulations related to the federal impairment determinations. The subject matter of the requested records directly and specifically concerns identifiable operations or activities of the federal government, with a connection that is direct and clear, not remote.

The Department of Justice Freedom of Information Act Guide expressly provides that "in most cases records possessed by federal agency will meet this threshold" of identifiable operations or activities of the government. *See* Department of Justice Guide to the FOIA (2009), p. 25. This requirement is clearly met in this case.

(2) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities in order to be likely to contribute to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be as likely to contribute to such understanding when nothing new would be added to the public's understanding.

The requested records are meaningfully informative about government operations or activities and are "likely to contribute" to an increased public understanding of those operations or activities. FOLKS is deeply concerned with sewage pollution from Monroe County and its municipalities in the Florida Keys and launched its campaign against local government wastewater shallow well injection practices. The records requested will provide FOLKS with valuable information that may be communicated to the public who share its concerns about sewage pollution in Florida. Specifically, the requested records will likely contribute to the public's understanding of: (1) EPA Region 4's implementation of its own September 15, 2021 Memorandum Region-wide and specifically in the State of Florida; (2) EPA Region 4's oversight of its delegation of the federal NPDES permit program to the State of Florida; (3) EPA Region 4's participation and oversight of FDEP's injection well permit issuance or modification process to ensure a thorough inquiry is made into the *Mauui* factors under the September 15, 2021 Memorandum; and (4) whether the EPA Region 4 or FDEP have properly prioritized shallow injection well permitting to review whether such wells require an NPDES permit under EPA's September 15, 2021 Memorandum.. The Florida public is

facing a crisis of sewage pollution throughout the State of Florida, and has a right to know how EPA oversees the Florida delegation of its NPDES permitting authority.

Disclosure of the requested records will enhance the public's knowledge of these issues and support public oversight of federal agency operations. These records will also illuminate in a clear and direct way, the operations and activities of EPA to fulfill important Congressional mandates under the CWA. There is a logical connection between the content of the records FOLKS has requested and the government's operations and activities related to the restoration and maintenance of the chemical, physical, and biological integrity of the Nation's waters.

Furthermore, the information being requested is new. The information requested is not, to our knowledge, publicly available in its entirety. The Government may omit sending us requested records that are available in publicly accessible forums such as on the internet or in published materials that are routinely available at public or university libraries so long as the Government provides us with adequate references and/or website links so that we may obtain these materials on our own. However, the requested materials will otherwise not be available unless we receive them from the Government in response to this FOIA request.

(3) The contribution to an understanding of the subject by the public is likely to result from disclosure: Whether disclosure of the requested information will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. The Agency will consider a requester's expertise in the subject area and ability and intention to effectively convey information to the public. The Agency presumes that a representative of the news media will satisfy this consideration.

Disclosure of the records will significantly promote the understanding of the general public, who frequently read about sewage pollution in the Florida Keys, diseased marine mammals and fish, and algal blooms, because FOLKS will analyze the information and make its conclusions known to its members, other environmental groups nationwide, and the public via press releases, social media, online newsletters, and by posting our analyses of the information on one or more internet web sites, including www.friendsofthelowerkeys.org, or citizen group email broadcast "systems." There has been significant media attention, at times at the national level, related to sewage pollution and nutrient overloading of Florida waters, which can exacerbate algal blooms and wreak havoc on marine life and impair human health. The documents requested are expected to shed light on these issues. Because FOLKS has the intention to analyze these records and inform its membership and the public at large, this requirement is easily met.

The activities of publicizing and distributing information received through FOIA requests demonstrate FOLKS' intention to disseminate the information to the public with the goal of disclosing material that will inform, or has the potential to inform, the public. *See also Forest Guardians v. U.S. Dep't of the Interior*, 416 F.3d 1173, 1180 (10th Cir. 2005) (finding an online newsletter and maintenance of a website sufficient to

show how the requester will disseminate information); *Federal CURE v. Lappin*, 602 F. Supp. 2d 197, 203-04 (D.D.C. 2009) (finding public interest organization’s “website [and] newsletter . . . are an adequate means of disseminating information,” and noting the organization’s “stature as [an] advocacy group . . . len[t] credence” to its dissemination argument). FOLKS will use the information obtained through this FOIA request in the methods described herein, therefore it will contribute to “public understanding.”

(4) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. The public’s understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent. The Agency will not make value judgments about whether information that would contribute significantly to public understanding of the operations or activities of the government is “important” enough to be made public.

Disclosure of the requested information will significantly contribute to public understanding of government operations. Specifically, the information will demonstrate whether and to what extent EPA has properly exercised oversight of its delegation of the federal NPDES Permit program to FDEP, including review of individual injection well permit issuance or modifications that may require NPDES regulations. FOLKS has an interest in EPA’s involvement in FDEP’s injection well permitting process following the September 15, 2021 Memorandum.

EPA’s activities related to the State of Florida permit delegation could have a significant impact on critical waters of the United States, including the highly protected waters of the Florida Keys National Marine Sanctuary. FOLKS has a demonstrated ability to disseminate the problematic features of government activities to a wider public audience, by litigation as well as by other means. Factors indicating an ability to disseminate information to the public include publication on an organization website and the ability to obtain media coverage. *Judicial Watch v. Rossotti*, No. 02-5154, 2003 WL 2003805 (D.C. Cir. May 2, 2003).

FOLKS analyses will be disseminated via press releases as well as posted on its website, www.friendsofthelowerkeys.org, and on its social media platforms, as well as on the websites and social media platforms of the many other local environmental groups with whom FOLKS collaborates. FOLKS has a proven track record of obtaining press coverage of the environmental issues it publicizes and is widely seen as a reliable informational resource for press and other organizations focused on environmental issues in the region. For example, FOLKS receives requests for comments from local media about environmental issues; provides comments to state regulatory agencies which are then distributed to the general public; communicates directly with elected officials, and also participates in advisory committees, stakeholder meetings, and numerous collaborations with other environmental organizations and organizations and government agencies. Through these and other means, FOLKS will disseminate its analyses of the requested

information. Similarly, FOLKS maintains an active education bank on its website, a bank of relevant press coverage, and informative press releases of its successful campaigns and accomplishments.

(5) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure.

FOLKS is an all-volunteer community-based environmental educational organization with a 501(c)3 tax exempt fiscal sponsor, both committed to the protection, preservation, and restoration of the environment according to federal and Florida law.

FOLKS has members and supporters throughout the Florida Keys dedicated to protecting and restoring the waters of the Florida Keys through fieldwork, advocacy, environmental education, and enforcement for the benefit of the communities that rely upon these precious coastal resources.

Accordingly, FOLKS has no commercial interest in the information requested. FOLKS seeks the information to determine the oversight provided by EPA regarding FDEP's delegation to manage the federal NPDES permit program, and to determine whether EPA's oversight has resulted in individual modifications that may violate NPDES regulations. EPA's oversight has serious implications for the restoration and maintenance of the waters of the United States. This information will therefore aid in FOLKS' efforts to advocate that the appropriate state, federal, or private entities take needed actions to protect our environment.

FOLKS has no financial interest in the information sought or any enforcement actions that may result. FOLKS' goal in urging enforcement of environmental laws is not private financial gain, but rather vindication of the larger public interest in ensuring that EPA is operating in such a way that it will protect, and contribute to the protection of public health, wildlife, and the environment.

(6) The primary interest in disclosure: Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester. A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure.

FOLKS has no commercial interest in the requested information, as discussed above. Accordingly, the identified public interest in the disclosure of the requested information also discussed above necessarily outweighs any commercial interest in this request. For the above reasons, FOLKS respectfully requests a fee waiver pursuant to 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l) for all copying costs, mailing costs, and other costs related to locating and tendering the documents.

In the event that your Agency denies FOLKS a fee waiver, please send a written explanation for the denial along with a cost estimate. Please contact us for authorization before incurring any costs in excess of \$25.

I look forward to your determination on this FOIA request within twenty days, as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i). The twenty-day statutory deadline is also applicable to FOLKS' fee waiver request. *See, e.g., Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003) (finding where an agency "fails to answer the [fee waiver] request within twenty days," judicial review is appropriate).

Please direct all correspondence and responsive records to:

Caron Balkany
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Summerland Key, FL 33042
Balkany@aol.com
305-849-1073 – phone
866-405-6610 - fax

Thank you for your attention to this request. If you have any questions about the requested records or the requested fee waiver, please do not hesitate to contact me at the phone or email above. In particular, I am happy to discuss ways in which we can narrow the request.

Sincerely,

s/Caron Balkany
Counsel to FOLKS